

OBSERVATIONS

UPON AN

Act for giving further Relief to the Owners and Masters of Ships.

ie the bill read 6 March 1798

THE Principle upon which the Ship and Sloop-Owners claim Support to the Act, is, that it will only make the Law what both themselves and the Shippers of Goods have always understood it to be; but the Act does not accord with this Principle.

The Law has been understood by all Parties, that Carriers of every Description are liable for the Damage in all Cases of Loss, unless such as arise from the Acts of God, the King's Enemies, or from such Causes as they have Relief from, to a certain Extent, by the Acts of 7th Geo. II. and 26th Geo. III.

It is not disputed, that many of the Parties conceived such Accidents as arose from Causes similar to that of Smith and Sheppard, were properly Acts of God; or in other Words, the Act of God has been understood to mean, every Thing that human Foresight and Prudence could not contemplate or prevent.

The Construction which Courts of Law have put upon the Term, Act of God, does seem to require a different Engagement between the Parties, than such an one as leaves the Carriers open to Responsibility for Risks they cannot foresee or prevent; but it by no means warrants a Law, which instead of leaving the *Carrier generally liable*, save as excepted, makes the *Merchant generally the Sufferer*, save as excepted: And this is the precise Effect of the present Act.

To have proceeded upon the Theory urged by the Supporters of the Act, after stating therein the present Liability of the Owners of Ships and Vessels, the Exception in their Favour should have been extended, by declaring the Term, Acts of God, to mean such Perils as the Parties have mutually understood the Expression to cover, namely, such as human Foresight and Prudence could not contemplate or prevent. Had this been done, it would have left the Principle of the Common Law, applying to all Carriers, untouched, and would have placed the Parties in the very Situation they before conceived themselves in: The Merchant, for Losses not within the Exception, would have had the Remedy, and in the Mode provided by the Common Law, and all Carriers in Principle would have remained on the same Foundation.

The Act has a very different Operation: It warrants the Argument, that *no Carriers* ought to be liable for any Thing but actual Default and Embezzlement; and if that Doctrine is admitted, *Carriers by Land* are as much entitled to be *generally released*, with special Exceptions, as Carriers by Water.

Both Shipping and Trade have very well flourished under the general Principle of the Law, as applied to Carriers of every Description; and that Principle has, without Question, been very generally understood; its Operation, in particular Cases, has been misunderstood by the Parties, and they having acted and flourished under that Misunderstanding, it is right those Cases should be *excepted* out of the general Principle; but it affords no Argument that the Principle itself should be overturned.

The Merchant, by the Common Law, when his Goods are lost or damaged by one of those Accidents which may come under the Description of *actual Default*, has only to prove that he delivered them in good Condition to the Carrier, and that they are not forthcoming in such good Condition: The Carrier is then bound either to shew the Loss or Damage happened by a Peril within the *Exception* of the Law, and for which he is not liable; or pay down the Amount of the Damage: And let it here be observed, no other Person, in all Probability, can have the Means of knowing or proving how the Loss or Damage did happen.

If the present Act passes into a Law, the Merchant will have to seek his Remedy under it, as an *express Statute*: The Common Law, and the Form of Proceeding under it, will be done away.

It is said, the Proof, in what Way any Loss happened, will still lie on the Carrier; but that cannot be the Case, unless he is left *generally accountable*; for it is a well-known Maxim, that a Man cannot recover upon a Declaration which does not state such a Cause of Action, as, if true, would entitle him, in Point of Law, to a Verdict: It will therefore be *absolutely essential* for the Owner of the Goods, in *all Cases* of Loss, to state, that his Damage was occasioned by *Embezzlement* or by *actual Default*; for in no other Case will the Act entitle him to recover. It will also be necessary for the Merchant to state in his Declaration the actual and immediate *Circumstance* that occasioned the Loss, otherwise the Carrier will not know for what he is called upon to answer.

When these Averments are made, another Principle of Law, which is universal, will compel the Party making to prove them, otherwise how can he have a Verdict upon Evidence?

This Difficulty will not be cured without another absurdity, by inserting a Clause in the Act to throw the Proof upon the Carrier; for as the Circumstance occasioning the Loss *must* be averred upon the Face of the Declaration, such a Clause would compel the *Defendant* in the Action either to prove the *Plaintiff's Case*, or to prove a Negative to an Affirmative not proved, both of which are contrary to all Rules of Jurisprudence.

Should the Merchant be placed in this Situation, the Act will preclude him from all Remedy, except that of filing a Bill in Chancery; for how otherwise is he to learn by what *particular Default* it was that his Goods became lost or damaged?

This, it is submitted, will not make the Law what it has been universally understood to be, but precisely the reverse; and this is the natural Consequence of the Bill, which is not to give Relief in Cases of *particular Hardship*, but to do away *general Responsibility*.

It will here naturally be suggested, that a Misunderstanding has prevailed as to the legal Acceptation of the Term Acts of God, and that a Remedy is absolutely necessary; the Opposers of the Bill do not deny the Reason of either of these Propositions, but the Remedy ought not to be worse than the Disease.

A safe, certain, and complete Remedy may be had without such an Act as this, and probably without any Act at all, by amending the Bill of Lading as to Ships, and by taking a Special Acceptance of Cargoes as to Vessels in the Tide Way of Rivers;—Responsibility will then stand upon express Contracts, entered into by Individuals according to their own Understandings of the Subject, and adapted in every Respect to the Circumstances of their respective Navigations. The Carriers will not only be relieved from such Cases as appear now unreasonably charged upon them, but may at any Time hereafter make Alterations to meet Cases not now foreseen.

If either Party should judge it expedient to insure, they will by this means be enabled to effect it with much more Equity and Readiness than by any Alteration of the Law, as the Insurer will have an express Contract before him, ascertaining, with all possible Accuracy, the Point at which the Carrier's Responsibility ends, and where the Insurer's is to begin.

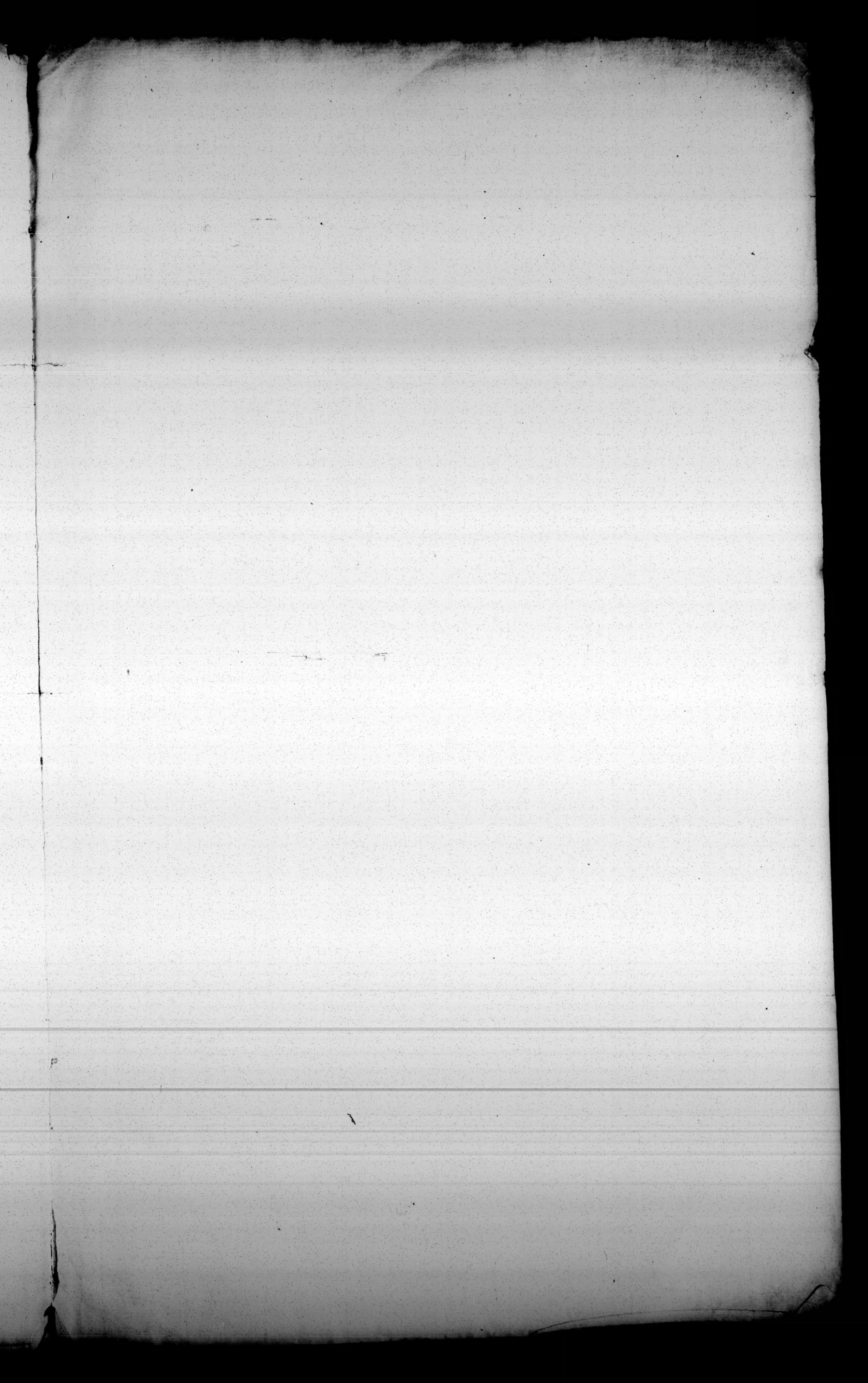
If any Difficulty exists as to compelling Shippers of Goods to make such special Engagements, let the general Declaration of Carriers, inserted at stated Periods in the Gazette, be full Notice of the Terms upon which Goods, not specially accepted, will be carried by Water.

If an Act of Parliament is wanted, it is for that Purpose, and also to limit the Tonnage, the Manner of Loading, and the Number as well as the Capacity of the Men employed on Board Vessels navigating in the Tide-Way of Rivers; Circumstances which have occasioned by far the greatest Part of the Losses complained of by the Sloop-Owners.

The Act, for the Reasons published on the 14th Instant, will be more peculiarly mischievous with Respect to Losses happening in the Tide-way of Rivers; and to the Clause which extends to take away Responsibility in those Cases the Opposition is principally directed; nevertheless, the Act itself is highly objectionable, as a Precedent for overturning a general and well-established Principle of Law.

COMMITTEE-ROOM,
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